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The path of protection of vulnerable migrant women through the jurisprudence of the ECtHR. Evolving protection and ongoing issues

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Abstract: This paper seeks to analyze the vulnerability of migrant women through the relevant jurisprudence of the European Court of Human Rights. The topics are varied and not exhaustive in this sector and include problems concerning women following a migratory path. A path that addresses trafficking, the exploitation of prostitution, the transnational mothering, the difficulties of family reunification, the critical issues in reception, the phenomenon of female genital mutilation with cases that partially and completely show the vulnerability and at the same moment contributing to an effective and higher level of protection.

Keywords: ECHR; ECtHR; migrant women; vulnerability;

human trafficking; family reunification; female mutilation; transnational mothering; servitude.

Introduction

The European Convention of Human Rights does not contain specific rules for migration (Sudre, 2021; Rainey, Wicks, Ovey, 2021; Villiger, 2023)[1] but only guarantees prepared to ensure correct interpretation (Renucci, 2015), through the use of the European Court of Human Rights (ECtHR), especially on appeals that are presented by migrant, voluntary, forced appellants and with regard to migrant women (Peroni, 2018). The problems that allow us to understand conventional jurisprudence place the appellants in a state of vulnerability that appears to be worthy of merit.

The ECtHR does not contain principles but a practice on the matter which seeks to also protect particularly vulnerable immigrant women (Bustamante, 2002; Fineman, Grear, 2013; Peroni, Timmer, 2013; Biggs, Jones, 2014; Nifosi, Sutton, 2017) as a phenomenon of various undoings in our times (Satteethwaite, 2004; Kawar, 2004; Stalford, Currie, 2009; Briddick, 2021).

Migrant women are the result of women in slavery, servitude, forced labor, exploitation of prostitution, unaccompanied

1Art. 5, par. 1, lett. f); 14 and 16 ECHR; art. 4 protocol n. 4 ECHR, art. 1 of Protocol n. 7 ECHR.

minors, female genital mutilation, the so-called transnational mothering (Lockwood, Smith, Karpenko-Seccombe, 2019) and the difficulties of reunification family, the problems relating to the reception of mothers with children and the peculiar difficulties that put women on a migratory path both in international legislation and in conventional jurisprudence (De Vries, Spijkerboer, 2019).

In the next paragraphs we will see a coherent, interesting jurisprudence that concerns vulnerable applicants, in factual circumstances that may incur a migratory path with international obligations that arise regarding binding instruments.

Vulnerable people and evaluation measures

Women are capable of influencing a migratory path that often goes beyond political and non-political logics[2] such as destinations, methods, opportunities and ties with the destination countries. In discriminatory treatments, the existing inequalities between women and men risk ending up in a network that follows the trafficking of human beings towards the streets of prostitution[3].

2https://www.un.org/development/desa/pd/content/international-migrant-stock.

3"(...) women are commonly subjected to multiple and intersecting forms of discrimination, as women, as migrants, and often on additional grounds such as, inter alia, race, sexuality or belonging to a minority group. Migrant women face higher risks of sexual and gender-based violence (including early and forced marriage, transactional sex/survival sex, domestic violence, rape, sexual harassment and physical assault), psychosocial stress and trauma, health complications, physical

Vulnerable and immigrant women suffer violations of their rights leading to different typologies that need protection.

This type of vulnerability (Luna, 2009; Besson, 2014; Ruet, 2015; Morochovich, 2017) are identified and respect a migratory path that allows intervening in the use of different regulatory tools to safeguard and protect (Satterthwaite, 2004). The vulnerability of migrant women is known internationally in treaty legislation, practice and international jurisprudence.

Within this context we remember the Belèm do Parà convention on violence against women of 1994 (Bettinger-Lopez, 2018) and a system that is not so much international but regional in the inter-American complex on the protection of human rights which is part of the vulnerability of women. Already Art. 9 of the Convention states that:

"(...) states must adopt measures to combat gender violence that take due account of the particular vulnerability to violence of migrant, refugee or displaced women (...)"[4].

At the European level, secondary law creates a common European system on asylum (Velluti, 2014) above all through

harm, injury and exploitation (...)". UN Women, making gender-responsive migration laws, 2017: https://www.unwomen.org/en/digital-library/publications/2017/7/making-gender-responsive-migration-laws

4According to art. 9 of the Belèm do Parà Convention: "(...) respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom (...)".

the three qualification directives[5], through procedures (Schittenhelm, 2019)[6] and reception mechanisms[7].

These are directives that seek to draw up a list of vulnerable subjects where Member States transpose and take into account, pregnant women, victims of trafficking, victims of rape, other serious forms of psychological violence, both sexual and physical, as well as victims and female genital mutilation[8].

The return directive[9] also takes into consideration vulnerable people, i.e. pregnant women, single-parent families with minors, victims of torture, rape and other serious forms of physical, sexual or psychological violence.

Within this context, we recall the General Recommendation n. 26 on women migrant workers[10] which comes from the Committee for the elimination of discrimination against women,

5Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9-26.

6Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, p. 60-95.

7Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, p. 96-116.

8Art. 20, par. 3 and art. 30, par. 2 of the Qualifications Directive; articles 2 and 21 of the Reception Directive; recital no. 29 of the Procedures Directive.

9Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country national, OJ L 348, 24.12.2008, p. 98-107.

10CEDAW, General recommendation No. 26 on women migrant workers, 5 December 2008, UN doc. CEDAW/C/2009/WP.1/R.

which states:

"(…) this general recommendation aims to elaborate the circumstances that contribute to the specific vulnerability of many women migrant workers and their experiences of sex-and gender-based discrimination as a cause and consequence of the violations of their human rights (…)".

We continue with the European Parliament resolution on migrant women of 2014[11] which actually states that:

"(…) undocumented migrant women are particularly vulnerable to the risks deriving from their legal status, being exposed more than men to the possibility of physical abuse, sexual and psychological issues, poor working conditions, labor exploitation by employers and double discrimination based on race and gender, as well as trafficking, prostitution and other situations of abuse during detention or in detention facilities. Reception is done (...) either through a regulation that provides for its protection although not expressly speaking of vulnerability, or through the use of different but intersecting categories of vulnerability or, finally, through a combination of the two hypotheses (...)"[12].

The vulnerability of migrant women are differentiated in their respective personnel and in their migration paths which clarifies the victims of trafficking who suffer the different type of exposure to violations of their rights of mothers with newborns, pregnant women that are carriers of victims of rape or genital mutilation. Various vulnerability factors emerge from the logic of the obstacle, the effective application of the common law and for the protection of the migrant woman (Weckel, 2015) recognizing that vulnerability has a prescriptive character which allows the need for a state obligation to adopt additional

11Resolution of the European Parliament, on undocumented migrant women in the European Union, of 4 February 2014, in OJEU C 93 of 24 March 2017, pp. 53-58.

12Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12-23.

protection in its comparisons.

A precise and clear definition does not exist but only a set of notions that describe this current phenomenon in international law which protects subjects who fall into its category as we can see through the ECtHR.

ECtHR, servitude, forced labor and human trafficking

Trafficking and reduction into domestic servitude according to Art. 4 ECHR guarantees the prohibition of slavery in forced labor (Villiger, 2023).

We immediately recall the Siliadin v. France case (Cullen, 2006)[13] of 2005 and the Rantsev v. Russia[14] of 2010 which clarifies the High Contracting Parties of the Convention which establish a legislative, administrative framework to punish trafficking and protect migrant women who are victims.

The ECtHR stated that:

"(...) the exploitation suffered by the minor was susceptible to being subsumed, according to the conventional lens, among the alleged failures of the state to respect its positive obligations under Articles 1 and 4 of ECHR (...) complaints of violation which affected the founding values of a democratic society, such as human dignity and the prohibition of slavery, servitude and forced labor (…)".

The applicability of the theory of positive obligations (Mowbray, 2004; Klatt, 2011; Stoyanova, 2023) is evident also in Art. 4 ECHR, which protects one of the "core rights" of the

13ECtHR, Siliadin v. France of 26 July 2005.

14ECtHR, Rantsev v. Cyprus and Russia of 7 January 2010.

Convention (Villiger, 2023)[15], that is

"(...) international treaty regulation on the matter[16] to which France was bound, and in particular the provisions that prescribe the prohibition of those practices of exploitation of minors (…)"[17].

The effective application of Art. 4 ECHR requires compliance with the positive obligations provided therein not only in the case of acts/omissions directly attributable to the state, but also for behaviors carried out by private individuals (Drzemczewski, 1979; Flor-Czakwątor, 2017), even if formally states have solemnly committed themselves to the abolition of slavery. The phenomenon of modern domestic slavery persists and causes concern in Europe, particularly affecting women[18].

The related case proposed by Siwa-Akofa Siliadin clarified the

15See art. 4, par. 1 and 15 ECHR.

16For example, the Geneva Convention on Slavery adopted on 25 September 1926 under the auspices of the League of Nations and entered into force on 9 March 1927; the ILO Convention n. 29 on forced labor adopted on 28 June 193 and entered into force on 5 May 1932; the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, adopted on 7 September 1956 following a specific conference organized by the Economic and Social Council of the United Nations and entered into force on 30 April 1957; the ILO Convention n. 189 on decent work for domestic workers adopted on 16 June 2013 and entered into force on 5 September 2013.

17See Art. 1 of the Supplementary Convention on the Abolition of Slavery, which prohibits those practices "(…) a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour (...)", also Art. 19, par. 1 of the New York Convention on the Rights of the Child.

18See the Parliamentary Assembly of the Council of Europe with recommendation 1523 (2001), adopted on 26 June 2001 and, subsequently, with recommendation 1663 (2004), adopted on 22 June 2004.

distinction between the notions of slavery[19], servitude[20] and forced labor[21] as provided for in paragraphs 1 and 2 of Art. 4 ECHR. In such cases the judges are subject to forced labor according to Art. 4, par. 2 ECHR, as a form of physical or mental coercion combined with the annulment of the victim's will[22].

Distinguish between servitude and slavery according to Art. 1, par. 4 ECHR the ECtHR noted that:

"(...) on the basis of the component of the objectification of the victim (...) slavery is indeed exercised "a genuine right of legal ownership", reducing the person to a mere object (…)".

It is absent in this case of servitude, which instead consists in a "particularly serious form of denial of freedom", that is, a conventional definition of the notion of servitude, consisting in the obligation to provide one's services imposed with the use of coercion[23]. It has valorised the particular vulnerabilities of the applicant, a foreign minor, isolated and without any resources, who had been handed over by her parents to a relative, who had nevertheless taken advantage of her vulnerable condition and her status as an irregular migrant.

19See Art. 7, par. 2, lett. c), International Criminal Court: "(…) enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children (...)".

20ECtHR, C.N and V. v. France of 13 November 2012, par. 80: "(…) domestic servitude is a specific offence, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance (…)".

21ECtHR, C.N and V. v. France of 13 November 2012, op. cit., par. 74.

22ECtHR, Siliadin v. France of 26 July 2005, op. cit., par. 117.

23ECtHR, Siliadin v. France of 26 July 2005, op. cit., par. 124.

In Siliadin v. France case of 26 July 2005 the ECtHR stated:

"In France, the minor's passport was promptly taken away, and she was "loaned" to friends of the relative, in whose house she was forced to work for them almost 15 hours a day, seven days a week and without any remuneration. It is stipulated that vulnerable individuals have the right to the protection of the state and in particular it establishes a form of effective deterrence against serious violations of personal integrity. It concluded that the applicant had been forced to do forced labor for years and held in a state of servitude, and that the French authorities had not condemned those responsible for such serious violations (...)" (Villiger, 2023)[24].

The French legislation at the time was sufficient to guarantee effective protection which punishes the conduct of reduction into servitude and the compulsion of forced labor[25] as a violation of positive obligations according to Art. 4 ECHR (Allain, 2009)[26].

In the Rantsev v. Cyprus and Russia case the ECtHR dealt with human beings under the sphere of Art. 4 ECHR for the first time clarifying that:

"(...) trafficking is not mentioned in the Convention, interpreting the latter "as a living instrument" (Lubarda, 2019)[27], this global phenomenon, unfortunately on the rise in recent years, still falls within the scope of application of Art. 4 ECHR (...) without the need to ascertain which of the three different types of conduct prescribed by the law (slavery, servitude or forced labor) is integrated in the specific case (…). It intersects with protections also offered by other international instruments, and, specifically,

24ECtHR, Stubbings and others v. United Kingdom of 22 October 1996, par. 64; A. v. United Kingdom of 23 September 1998, par. 22.

25Recommendation 1523 (2001), the Parliamentary Assembly of the Council of Europe complained that "(…) none of the Council of Europe member states expressly make domestic slavery an offense in their criminal codes (...)". With the Recommendation 1663 (2004), the Parliamentary Assembly encouraged member states to combat "(…) domestic slavery in all its forms as a matter of urgency, ensuring that holding a person in any form of slavery is a criminal offense in all member states (...)".

26ICTY, Prosecutor v. Kunarac, Kovač and Vuković, Case No. IT-96-23&23/1, Trial Judgment, 22 February 2001, par. 847.

27ECtHR, Tyrer v. United Kingdom of 25 April 1978.

by the 2000 Palermo Protocol on trafficking in persons, in particular women and children[28], and by the Convention of Council of Europe on the fight against trafficking in human beings 2005 (...)"[29].

This is a subsidiary and complementary protection within a regulatory framework which is accompanied by an active role of the relevant state authorities in the prevention of the phenomenon, effectively offering protection that is necessary for states that adopt prevention programs and policies in the phenomenon of trafficking training of police forces and officials who are the main actors for the protection of immigration as well as at a repressive level which includes the punishment of those responsible.

The abuse of the condition of vulnerability it is represented both at internally and internationally level[30], integrating the crime of human trafficking. A vulnerability that recognizes the case of women and minors. The victims of trafficking are mainly women that:

"(...) suffer severe physical and psychological consequences which make them too traumatized to present themselves as victims (...)"[31].

Thus, a violation of Art. 2 ECHR is noted. A procedural request from the Cypriot authorities due to the effective investigation

28Additional Protocol to the United Nations Convention against Transnational Organized Crime for the prevention, suppression and prosecution of trafficking in human beings, especially women and children, signed in Palermo between 12 and 15 December 2000 and entered into force on December 25, 2003.

29Council of Europe Convention on Action against Trafficking in Human Beings, adopted in Warsaw on 16 May 2005 and entered into force on 1 February 2008.

30See, art. 3, letter. a) of the Palermo Protocol on trafficking and art. 4, letter. a) of the Council of Europe Convention on Trafficking where they provide a definition of the crime of trafficking in persons.

31ECtHR, Rantsev v. Cyprus and Russia of 7 January 2010, par. 320.

according to the suspected causes of one's death. The ECtHR in both the Siliadin and the Rantsev cases specified episodes of trafficking and coercion of the performance of domestic services against migrant women. This is a procedural protection that is offered in Art. 4 ECHR. The European judges analyzed the outcomes inconsistent with the complaints and procedural violations of Art. 4 ECHR.

In the J. And others v. Austria case regarding the violation of Art. 4 ECtHR by the Austrian authorities it was clarified that:

"(...) there was no conventional obligation to investigate the recruitment of the applicants in the Philippines or their alleged exploitation in the United Arab Emirates, nor to provide for universal criminal jurisdiction over the trafficking crimes committed abroad (...)"[32].

Judge Pinto de Albuquerque, in his dissenting opinion, stated that:

"(...) they had in any case been deficient in the punishment of those responsible for the (alleged) trafficking (...)" only the late complaint of the appellants had convinced him to vote in (…) majority (…)"[33].

The positive affirmation of the appellants' vulnerability is exploited in this case in order to mitigate the burden of timely reporting.

ECtHR: Exploitation of prostitution

The exploitation of prostitution is part of the subject of trafficking, looking at various sentences of the ECtHR as an

32ECtHR, M. and others v. Italy and Bulgaria of 31 July 2012; C.N. and V. v. France of 11 January 2013; J. and others v. Austria of 17 January 2017.

33ECtHR, J. and others v. Austria of 17 January 2017.

evolving case.

Let us immediately recall the L.E. v. Greece case of 2016[34], S.M. v. Croazia of 2019[35] and A.I. v. Italy of 2021[36] it was ascertained that the violation of the conventional provisions is beyond Art. 4 ECHR. Additionally, Art. 6 ECHR protects the right to a fair trial, as well as Art. 13 ECHR guarantees the right to an effective remedy according to Art. 8 ECHR as a right that respects private and family life[37].

The ECtHR stated that:

"(…) the effectiveness of the preliminary investigations into the case had been compromised by a series of shortcomings and an overall lack of diligence. In particular, the testimony decisive for the qualification of trafficking for the purposes of exploitation of prostitution had been unexpectedly not included in the file and this had delayed the investigation and caused an initial rejection of the appellant's complaint[38]. Delays of several years and shortcomings with respect to the procedural obligations of the Greek state are noted[39], finding in particular that the acquittal of one of the two responsible for the trafficking and the failure to find the other in order to put him on trial demonstrated per tabulas the ineffectiveness of the Greek system in the present case (...) he was a victim of trafficking in human beings for the purpose of sexual exploitation, and as such a particularly

34ECtHR, L.E. v. Greece of 21 January 2016.

35ECtHR, S.M. v. Croatia of 25 June 2020.

36ECtHR, A.I. v. Italy of 1st April 2021.

37ECtHR, Rantsev v. Cyprus and Russia of 7 January 2010, par. 303: "(...) does not exclude the possibility that, in the particular circumstances of a case, a particular form of conduct linked to human trafficking may raise complaints of violation of other conventional provisions (…)".

38See articles 11 and 12 of Directive 2011/36/EU of the European Parliament and of the Council, concerning the prevention and suppression of trafficking in human beings and the protection of victims, and which replaces Council Framework Decision 2002/629/JHA of 5 April 2011, in OJEU L 101 of 15 April 2011, p. 1-11. Council Directive 2004/81/EC, concerning the residence permit to be issued to third-country nationals who are victims of trafficking in human beings or involved in an action to facilitate illegal immigration who cooperate with the competent authorities, of 29 April 2004, in OJEU L 261 of 6 August 2004, p. 19-23.

39ECtHR, T.I. and others v. Greece of 18 July 2019.

vulnerable person, in respect of whom the positive procedural obligation of protection referred to in Art. 4 ECHR in an even more stringent manner[40], that is, through a scrupulous investigation, diligent management of the criminal proceedings and, finally, the prompt punishment of those responsible (…). The duration of the proceedings in question was excessive for a level of jurisdiction and not satisfied the "délai raisonnable" requirement, without there being any effective remedy to complain about the excessive length of the proceedings. All in violation of Art. 6, par. 1 and art. 13 ECHR (…)"[41].

The sentence of S.M. v. Croatia deserves our attention by taking the opportunity to clarify points relating to human trafficking and exploitation of prostitution (Sudre, 2021)[42]. It was stated that:

"(…) the European judges have underlined here to decide whether to characterize a behavior or a situation as trafficking in human beings pursuant to Art. 4 ECHR (and therefore to verify whether this provision can be applied in the particular circumstances of a prostitution case), the Court must rely on the definition of international law contained in Art. 4 of the 2000 Palermo Protocol on trafficking (...)"[43].

The A.I. v. Italy case was dealing with the Nigerian appellant faced with a proceeding regarding the adoptability status of minors which had been pending for over three years. The ECtHR stated that:

40Directive 2011/36/EU of the European Parliament and of the Council, concerning the prevention and suppression of trafficking in human beings and the protection of victims, and which replaces Council Framework Decision 2002/629/JHA of 5 April 2011, op. cit., art. 4, par. 2, lett. a).

41ECtHR, T.I. and others v. Greece of 18 July 2019.

42Art. 4 ECHR.

43According to Art. 4 ECHR and Art. 4 of the Palermo Protocol: "(…) 1) an action (the recruitment, transport, transfer, reception or hospitality of people); 2) the means (the threat or use of force or other forms of coercion, kidnapping, fraud, deception, abuse of power or a position of vulnerability, or the giving or receiving of payments or benefits to obtain the consent of a person who has control over another person); 3) the purpose of the exploitation (which includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or organ harvesting) (…)".

"(...) the Court of Appeal, a specialized judicial body composed of two professional judges and two lay judges, had not taken into consideration the conclusions of the appointed experts who recommended maintaining the links between the appellant and her minor daughters, nor had she given reasons as to why she had decided not to take them into account (…)".

The internal judges should have carried out a more detailed assessment of the applicant's vulnerability during the procedure[44], as well as establishing whether the decision to interrupt contact with her mother had been taken in their best interests.

The domestic authorities had not given sufficient emphasis to the importance of family life for the applicant leading to the cessation of mother-daughter contact. Hence it is noted a violation of Art. 8ECHR, since the adoption procedure had not been accompanied by guarantees proportionate to the seriousness of the interference with the right to respect for family life and the interests at stake in the specific case[45].

The applicant's vulnerability as a victim of trafficking and a single mother of two minor daughters is part of a crucial element according to the declaration of violation of Art. 8 ECHR and as the same sentence states:

"(…) dans le cas des personnes vulnérables, les autorités doivent faire preuve d'une attention particulière et doivent leur assurer une protection accrue (...)"[46].

44See, art. 12, par. 7 of the Council of Europe Convention action against trafficking in human beings of 16 May 2005: https://rm.coe.int/168008371d

45See art. 8 ECHR. ECtHR, Moser v. Austria of 21 September 2006; Zhou v. Italy of 21 January 2014; Soares de Melo v. Portugal of 16 February 2016.

46ECtHR, A.I. v. Italy of 1st April 2021, par. 102.

Family reunification and "transnational mothering"

The issue of family reunification is a phenomenon that concerns migrant women. We can talk about "transnational mothering" (Staiano, 2013; Lockwood, Smith, Karpenko-Seccombe, 2019) dealing with specific and disproportionate burdens with migrant women who are far from their children who face the cause of gender expectations in the role of women as mothers who honor their departure in terms of emotional assistance beyond economic support.

In relation to family reunification which is part of the law of the EU[47] it establishes an acceptance which is part of the applications for reunification in the circumstances which is part of the directive which provides for the application rejected when:

"(...) the sponsor and his family or his family members do not have or no longer have an effective marital or family bond, thus leaving the applicant with the task of proving the existence of an effective bond (...) offering a wide margin of appreciation to state choices (...) raising the protection bar (...)"[48].

The Tuquabo-Tekle and others v. Netherlands of 2005[49] and the Mubilanzila Mayeka and Kaniki Mitunga v. Belgium of 2006[50]

47Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12-18.

48ECtHR, Knel and Veira v. The Netherlands of 5 September 2000; P.R. v. The Netherlands of 7 November 2000; Chandra and others v. The Netherlands of 13 May 2003; Ramos Andrade v. The Netherlands of 6 July 2004; Benamer and others v. The Netherlands of 5 April 2005; I.A.A. and others v. United Kingdom of 8 March 2016.

49ECtHR, Tuquabo-Tekle and others v. The Netherlands of 1st December 2005.

50ECtHR, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium of 12 October

cases deserve particular attention from the jurisprudence. The aforementioned cases include profiles of protection of migrant women and migrant minors who are far from their mothers under the different evaluation angles which involve different violations of the convention such as the right to respect private and family life, prohibition of inhuman and degrading treatments and the right to personal liberty.

The ECtHR has taken the relevant principles into consideration by trying to clarify that these cases assess the scope of the obligation to admit established migrants to the territory. This is a scope that varies according to the particular circumstances of the persons concerned which go beyond the general interest. Art. 8 ECHR (Sudre, 2021) imposes on a state the general obligation to respect the choice of married couples in their country of marital residence and to authorize the related family reunification in its territory[51].

In a first interpretation we note the rigorous nature that takes into consideration the vulnerability of the appellants, i.e. mothers and daughters to a balancing of their own interests at stake where the ECtHR does not consider the age of the minors involved in the situation of the country of origin where the parental dependency are part of a series of vulnerabilities[52].

2006.

51ECtHR, M.A. v. Denmark of 8 July 2021.

52ECtHR, Tuquabo-Tekle and others v. The Netherlands of 1st December 2005, par. 44. Senigo and others v. France of 10 July 2014.

The Mubilanzila case concerns an unaccompanied minor who joins his mother due to her irregular status who is blocked and detained. The ECtHR stated that:

"(...) the vulnerability of the minor applicant derives from three factors: her particular minor age, her status as an irregular migrant and (...) the circumstance of not being accompanied by an adult. These three layers of vulnerability determine a situation of composite vulnerability (and "extreme", if one wants to use the language of the sentence), which has taken on a decisive importance over all other circumstances, including irregular entry into the territories (...) of the positive protection obligations referred to in Article 3 ECHR on the part of the Belgian authorities, both as regards the conditions of detention of the minor and as regards her subsequent expulsion to the Congo (…). Belgium had in the present case a duty of enhanced protection towards the minor, which he completely disregarded (...)"[53].

Migrant women and reception

Reception and migrants requesting asylum are part of various cases such as: M.S.S. v. Greece and Belgium[54], Tarakhel v. Switzerland[55] and M.D. and A.D. v. France of 2021[56]. In such cases alleged violations of Art. 43 ECHR and of Art. 5, par. 1 and 4 ECHR are noted (Villiger, 2023).

The line followed has to do with the detention of accompanied and unaccompanied minors. The judges could not affirm the basis of extreme vulnerability[57] given the young age of the

53ECtHR, Muskhadzhiyeva and others v. Belgium of 19 January 2010; Rahimi v. France of 5 April 2011; Popov v. France of 19 January 2012; A.B. and others v. France of 12 July 2016; S.F. and others v. Bulgaria of 7 December 2017; H.A. and others v. Greece of 28 February 2019; S.H.D. and others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia, Slovenia of 13 June 2019; G.B. and others v. Turkey of 17 October 2019.

54ECtHR, M.S.S. v. Belgium and Greece of 21 January 2011.

55ECtHR, Tarakhel v. Switzerland of 9 November 2014.

56ECtHR, M.D. and A.D. v. France of 22 July 2021.

57ECtHR, Popov v. France of 19 January 2012, par. 91: "(…) les mineurs, qu'ils

minor, the reception conditions in the detention center they lived in, the duration of detention (approximately 11 days), the outcome of the issuing of provisional measures by the ECtHR itself which in practice has ascertained the competent authorities that are subjected to treatments exceeding the level of severity that requires the application of Art. 3 ECHR.

The ECtHR stated that the:

"(…) bonds between a mother and her four-month-old baby are based on the interaction between them following breastfeeding and shared emotions. This is an aspect of considerable importance in the sentence, given that the assessment of violation for accompanied minors is rarely combined with that for their parents. This is also necessary because the conclusions reached should be applied to the mother due to the particular circumstances of the case. The particularly vulnerable status of the breastfeeding mother is specifically valorised, which (...) constitutes a factor also recognized by Euro-unit legislation (...)" (Vandenhole, Ryngaert, 2012; Brittle, Desmet, 2020)[58].

The related complaints of par. 1 and 4 of Art. 5 ECHR (Sudre, 2021) take into consideration the elements that are sufficient to conclude that the national authorities do not carry out an adequate examination to verify that the initial detention extends and that it constitutes measures of last resort, i.e. they can replace a less restrictive one for the newborn girl avoiding the risk of running away. Even Art. 5, par. 1 ECHR assessed against the minor. Continuing, the ECtHR itself stated that:

soient ou non accompagnés, comptent parmi les populations vulnérables nécessitant l'attention particulière des autorités (…)". M.D. and A.D. v. France of 22 July 2021, par. 63: "(…) l'âge des enfants mineurs, le caractère adapté ou non des locaux au regard de leurs besoins spécifiques et la durée de leur rétention (…)".

58ECtHR, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium of 12 October 2006, parr. 62, 70. Muskhadzhiyeva and others v. Belgium of 19 January 2010, par. 63; Popov v. France of 19 January 2012, par. 103.

"(...) the internal judges, in exercising judicial control relating to the legitimacy of the initial detention and of the decision to order its extension for 28 days (a period which ended 11 days after the indication of a provisional measure by the Court), had not sufficiently taken into account the second appellant's status as a minor, in contrast with Art. 5, par. 4 ECHR (…). It is distinguished between the minor, an extremely vulnerable subject, to whom the necessity test regarding detention should be applied, and the mother, who as an adult migrant (although equally considered vulnerable) does not enjoy the same conventional guarantees and this in accordance with a jurisprudential orientation that has always been much criticized (...)[59].

(Follows): Female genital mutilation

The practice followed in some African and non-African countries of female mutilation is a topic that has not been addressed much by the ECtHR itself since it has found no violations in the Convention[60]. These are cases that present the same circumstances where migrant women who are married to their minor daughters are destined for an expulsion order who complain about the risk of female genital mutilation when returning to their country of origin.

In particular, the ECtHR notes that:

"(...) subjection to female genital mutilation constitutes treatment contrary to Art. 3ECHR, as unanimously recognized at an international level (…). It denies that Guinean, Sudanese and Nigerian women continue against their will to be victims of such brutal practices, despite the fact that over time regulations (state or local) have been adopted that prohibit them and are in contempt for the proactive role of contrast played by civil society itself[61]

59ECtHR, Chahal v. United Kingdom of 15 November 1996, par. 112.

60ECtHR, Collins and Akaziebie v. Sweden of 8 March 2007; Izevbekhai and others v. Ireland of 17 May 2011; Omeredo v. Austria of 20 September 2011; Sow v. Belgium of 18 January 2016; R.B.A.B. and others v. The Netherlands of 7 June 2016.

61See from the General Assembly of the UN n. 71/168, Intensifying global efforts for the elimination of female genital mutilation of 19 December 2016, UN doc. A/RES/71/168.

(…). Through a backward assessment of the vulnerabilities of the appellants, sometimes implicit, sometimes explicit (...) the measures in question reach the conclusion that the aforementioned appellants do not risk or have not demonstrated that they risk being subjected to genital mutilation in the event of expulsion to their country of origin, since being independent and educated can avoid mutilation (...)"[62].

In the R.B.A.B. and others v Netherlands case, the Court stated that:

"(...) the mother and her two minor daughters would have risked being exposed to female genital mutilation in their country of origin, and that she had subsequently opposed an expulsion measure (…). The local Nigerian regulations prohibit the practice of female genital mutilation, concluding thus in a non-violation of Art. 3 ECHR, on the basis of the following reasoning: there is no risk for a minor of being subjected to infibulation to the extent that there is family protection, given that the choice to carry out the practice is in fact delegated to her family members (who in the case in point they were against) (...)"[63].

The child protection center leaves families to their parents/family members who, in the form of mothers, are sufficient to educate and counter the infliction of tradition, of minor daughters who do not run any risk. This position comes into conflict with the principle of the best interests of the minor as an interpretative parameter that rewards and considers the respect of all those involved in this type of situation (Pobjoy, 2018)[64], expressing thus a relative vulnerability[65].

The ECtHR did not take into consideration the best interests of minors and places genital mutilation under the will of protection

62ECtHR, Sow v. Belgium of 18 January 2016, par. 68: "(…) la requérante ne peut pas être considérée comme une jeune femme particulièrement vulnérable (…)".

63ECtHR, R.B.A.B. and others v. The Netherlands of 7 June 2016, par. 57.

64Article 3, par. 1 of the New York Convention on the Rights of the Child, adopted on 20 November 1989.

65ECtHR, Loizidou v. Turkey of 18 December 1996, par. 43.

of their families, allowing minors to self-determine depending de jure and de facto on their parents' decisions. We can speak of the theory of Drittwirkung that does not consider the effectiveness of one's protection.

The judges take care the family member passes away and mother's circumstance of finding herself forced into her family of origin, practicing tradition towards her daughter conflicts with her own will. Thus the vulnerability of the appellants, both minors and their mothers, is in contrast to the valorisation of the vulnerability of the appellants, minors, migrants and victims of practices that provide effective complementary protection for themselves[66].

In the case under investigation, the ECtHR concluded that:

"(...) the risk of suffering genital mutilation once expelled back to the country of origin constitutes a violation of Art. 3 ECHR by the state issued the expulsion order".

Among other things it cannot find a forum in the application of an international treaty on human rights. And this is even more so, to the extent that one is faced with complaints of violation of Art. 3 ECHR. This has an absolute and mandatory character in the conventional system[67].

66Committee on the Rights of the Child in General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, UN doc. CRC/C/GC/14, al par. 75: "(…) purpose of determining the best interests of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those covered in the Convention on the Rights of Persons with Disabilities, the Convention relating to the Status of Refugees, among others (…)".

67ECtHR, R.B.A.B. and others v. The Netherlands of 7 June 2016.

The interpretation that the ECtHR derives in tempis applies to the principle of non-refoulement which extends to Art. 33 of the Geneva Convention on the status of refugees (Sudre, 2021)[68], where states have the obligation to expel and reject the individual to a state who suffers inhuman or degrading treatment that has to do with female genital mutilation continues to be perpetrated to any ineffectiveness and related prohibitions.

Concluding remarks

The jurisprudence used up to now in the matter of migrant women allows us to talk about the notion of vulnerability, enhancing the factors of this to the applicants. We are surprised that the protective protection notes the vulnerability and use of the prescriptive scope. The conventional paths note the vulnerability of the applicant as the main element (Peroni, Timmer, 2013) and the valorisation of the vulnerable elements that have to do with the cases in question, i.e. minor age, pregnancy status, single parent, victim of trafficking, of violence, a person suffering from various pathologies, etc.

Special protection strengthens the application of standards that are favorable and guaranteed to the applicants starting from the vulnerability assessment which creates and strengthens a

68ECtHR, Soering v. United Kingdom of 7 July 1989; Cruz Varas and others v. Sweden of 20 March 1991; Vilvarajah and others v. United Kingdom of 20 March 1991.

positive obligation of the state towards the applicants in matters of human trafficking finding thus the violation of their damages to a certain conventional norm such as the detention of foreign minors.

The ECtHR's assessment of complementary protection enhances what comes from international human rights obligations and not only the objective of growing and effective protection. The use of the Palermo Protocol refers to the complaints of Art. 4 ECHR that are presented to victims of trafficking. The use of the notion enhances the vulnerability factors that can be found and which lead the migrant applicants in a protective and effective way. The lack of assessment of the vulnerability that has to do with migrant women leads to disappointing conclusions in terms of protection as demonstrated in the matter of family reunification and female genital mutilation.

We can say that judges make more precise and less casuistic use of the vulnerabilities of migrant women, contributing to a reduction in the serious violations that are suffered by migrant women which recur in Europe and which crowd numerous lives, i.e. women who move away and/or who go permanently leave their country in search of their own better future. An endless daily life without always the calculation of female human life.

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